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In The

Supreme Court of the United States

No. 73-660

C. A. NEFF, SUPERINTENDENT OF FIELD UNIT #21,
Petitioner,

v.

FRANCIS J. MORAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED

Did The United States Court of Appeals For the Fourth Circuit Err In Affirming The Determination Of The District Court That The Petitioner Had Exhausted His Available State Court Remedies Under 28 U.S.C. § 2254 With Regard To The Allegedly Erroneous Instruction? 2

Did The United States Court Of Appeals For The Fourth Circuit Err In Affirming The Decision Of The United States District Court For The Eastern District Of Virginia Where That Court Did Not Consider That If The Petitioner Had In Fact Exhausted His Available State Court Remedies That The Supreme Court Of Virginia Under The Circumstances Must Have Concluded That Alleged Instructional Error Was Harmless Beyond A Reasonable Doubt? 2

STATUTES PRESENTED 3

STATEMENT OF THE CASE 4

ARGUMENT

I. The Courts Below Erred In Holding That There Had Been Exhaustion Of The Available State Court Remedies Insofar As The Alleged Instructional Error Is Concerned In Light Of The Fact That The Petition For Appeal Did Not Include This As An Error And Further In Light Of The Fact That The Issue Was Not Presented To The Supreme Court Of Virginia Squarely Until The Filing Of A Petition For A Rehearing And That Court Has Previously

Page

Held That It Will Not Take Cognizance Of Issues Raised For The First Time In A Petition For Rehearing. 7

II. Even Assuming, Arguendo, That Moran Has In Fact Exhausted His State Court Remedies, The Federal Court Should Assume That The Supreme Court Of Virginia, In Light Of Its Decision In *Sharp* v. *Commonwealth*, 192 S.E.2d 217 (1972), Just Ten Days Prior To Its Denial Of A Writ Of Error In This Case, Determine That The Granting Of The Instruction Herein Was Harmless Error And The Federal Courts Should Have Accepted That Determination In The Absence Of Any Compelling Evidence To The Contrary. 11

CONCLUSION 13

CERTIFICATE OF SERVICE 13

APPENDIX

TABLE OF CITATIONS

Cases

Lavallee v. DellaRose, ... U.S. ....., 35 L.Ed.2d 637 (1973) 13

Miller v. Lukhard, Civil Action No. 59-73-R (E.D. Va. April 20, 1973) 9

Murch v. Mottram, ... U.S. ....., 34 L.Ed.2d 194 (1972) 10

Picard v. Connor, 404 U.S. 270 (1971) 8

Schneckloth v. Bustamonte, ... U.S. ....., 36 L.Ed.2d 854, 876 (1973) 11

Sharp v. Commonwealth, 213 Va. 269, 192 S.E.2d 217 (1972) 5, 6, 11, 12

Slayton v. Smith, 404 U.S. 53 (1971) 10

Tazewell v. Herman, 108 Va. 416, 60 S.E. 767, 61 S.E. 752 (1908) 8, 9

Statutes *Page*

Former Rules of the Supreme Court of Appeals of Virginia:
Rule 5:3 ..... 3, 7
Rule 5:12 ..... 3, 7

Code of Virginia (1950), as amended:
Section 8-596 9
Section 17-19 9
Section 54-524.101(a) 4
Section 19.1-284 7

28 U.S.C. § 1254 2

28 U.S.C. § 2254 ..... 2, 9

In The

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No. .....

C. A. NEFF, SUPERINTENDENT OF FIELD UNIT #21,
Petitioner,

v.

FRANCIS J. MORAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

C. A. Neff, Superintendent of Field Unit #21, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on September 11, 1973, in the case of Francis J. Moran v. C. A. Neff, Superintendent, Field Unit #21. This judgment vacated the prior Memorandum Decision of that Court dated June 28, 1973, and the order of July 19, 1973, denying the petitions for rehearing filed on behalf of both parties.

OPINIONS BELOW

The memorandum order of the United States District Court for the Eastern District of Virginia, Alexandria

Division, of March 20, 1973, is not reported but is included herein as Appendix A (App. p. 1). The Order denying the Motion to Alter and Amend Judgment is included herein as Appendix B (App. p. 9). The initial memorandum decision of the United States Court of Appeals for the Fourth Circuit dated June 28, 1973, is similarly unreported, but is included herein as Appendix C (App. p. 10). The order of July 19, 1973, denying petition for rehearing is also unreported and is included herein as Appendix D (App. p. 11). The final order of the United States Court of Appeals for the Fourth Circuit dated September 11, 1973 is likewise unreported and is included herein as Appendix E (App. p. 12).

JURISDICTION

The jurisdiction of this Court to issue a Writ of Certiorari in this case is grounded upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

Did The United States Court Of Appeals For The Fourth Circuit Err In Affirming The Determination Of The District Court That The Petitioner Had Exhausted His Available State Court Remedies Under 28 U.S.C. § 2254 With Regard To The Allegedly Erroneous Instruction?

II.

Did The United States Court Of Appeals For The Fourth Circuit Err In Affirming The Decision Of The United States District Court For The Eastern District Of Virginia Where That Court Did Not Consider That If The Petitioner Had In Fact Exhausted His Available State Court Remedies That The Supreme Court Of Virginia Under The Circumstances Must Have Concluded That Alleged Instructional Error Was Harmless Beyond A Reasonable Doubt?

STATUTES PRESENTED

Code of Virginia (1950), as amended

§ 19.1-284. *Petition for writ of error to assign errors; transcript; writ of certiorari.*—Any party for whom a writ of error lies may apply therefor on petition, which shall assign errors. With the petition there shall be a transcript of record of so much of the case wherein the judgment complained of is as will enable the Court or judge to whom the petition is to be presented properly to decide on such petition, and enable the Court, if the petition be granted, properly to decide the questions that may arise before it. Upon a suggestion of a diminution of the record a writ of certiorari may be awarded by the Court or judge in vacation.

Rules, Supreme Court of Virginia

Rule 5:3. *Petitions for Appeal and Briefs in Opposition.* (Former Rule.)

§ 1. *Form and Contents of Petition.* Except as provided in this Rule, and except when the appeal is a matter of right, the form, contents and length of the petition for appeal shall conform in all respects to the requirements for the appellant's opening brief, but need not be printed. The petition for appeal may be adopted as and in lieu of the opening brief if the election to do so is stated in the manner required by § 2 of this Rule. If so adopted it shall be printed and distributed as the record is printed and distributed under Rule 5:12, § 4, except that it shall be printed under separate cover.

Rule 5:12. *Briefs.* (Former Rule.)

§ 1. *Form and Contents of Appellant's Brief.* The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall

be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned, and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one counsel practicing in this Court, and his address.

STATEMENT OF THE CASE

The petitioner was tried in the Circuit Court for Caroline County, Virginia, on February 18, 1972, before a jury on a charge of possessing controlled drugs with intent to distribute same in violation of § 54-524.101(a), Code of Virginia (1950), as amended. The evidence at trial consisted entirely of the testimony of Investigator L. B. Mitchell of the Virginia State Police and Mrs. Faye D. Taylor, a drug chemist for the State Board of Pharmacy. At the conclusion of the evidence, the Court granted certain instructions to the jury, including an instruction based on § 54-524.101(a) of the Code which allowed the jury to convict the defendant "solely" on the basis of evidence as to the quantity of the drugs. This instruction was objected to by the petitioner but the objection was overruled and the jury thereafter came in with a judgment of conviction and the petitioner was sentenced to serve five (5) years in the Virginia State Penitentiary and pay a $1,000 fine. Counsel

for the petitioner thereafter filed a Notice of Appeal and Assignments of Error which, among other things, stated that:

> "6. The Court erred in ruling and instructing the jury that it could find Defendant guilty of the offense charged solely upon evidence as to the quantity of any controlled drug or drugs unlawfully possessed by him." (See Notice of Appeal and Assignments of Error attached hereto as Appendix F.)

The petitioner subsequently filed a Petition for Appeal which set forth at several points—the Subject Index, the Statement of Questions Presented and the sub-headings under the Argument—the issues being relied on by petitioner for reversal of the judgment and in none of these places was any mention made of the allegedly faulty instruction. The only reference to that instruction, in fact, is a fleeting mention made during the course of an argument that:

> "Warrantless Search Beyond Area Of Arrestee's Person Is Illegal." (See Petition for Appeal attached hereto as Appendix G at App. 25.)

On October 13, 1972, only ten (10) days after the Court's decision in *Sharp* v. *Commonwealth,* 213 Va. 269, 192 S.E.2d 217 (1972), holding the grant of a similar instruction to be erroneous, the Supreme Court of Virginia refused a Writ of Error to the petitioner, Francis J. Moran (See Order of Supreme Court of Virginia attached hereto as Appendix H). The petitioner then filed a Petition for Rehearing (See Appendix I) and rehearing was rejected by order of the Supreme Court of Virginia dated November 28, 1972 (See Appendix J).

The petitioner filed a petition for a writ of habeas corpus dated December 23, 1972, in the United States

District Court for the Eastern District of Virginia, Alexandria Division and the Court ordered the petition filed by order of December 26, 1972. The respondent, by counsel, thereafter filed an answer admitting that petitioner had exhausted his available State court remedies with regard to the search and seizure question raised but denying that there had been any exhaustion with regard to the instruction issue and praying that the Court deny and dismiss the petition in connection with that issue without prejudice. By order dated March 20, 1973, the Court granted the petitioner a writ of habeas corpus based on the giving of the instruction in question and the Court determined "that the petitioner exhausted his state remedies when the Supreme Court of Virginia summarily dismissed Moran's complaint, without reasons given for the denial of this specific claim even though it was subsequent to *Sharp*." Counsel for the respondent then filed a Motion to Alter and Amend the Judgment reiterating that there had been no exhaustion of State court remedies with regard to this issue but asserting that, even if the Court found exhaustion, the Supreme Court of Virginia must have determined that the granting of the instruction was harmless error in light of the evidence. By order dated March 27, 1973, the Court denied this motion on the grounds that the Assignments of Error did list the instruction in question as one of the errors, that the Petition for Appeal at page 9 did discuss the objection, that in his Traverse and Response to respondent's answer, counsel for the petitioner asserted that he was advised that the Court had another challenge to the constitutionality of this section before it and no decision would be made until the constitutionality of the statute was determined and that the issue had specifically been brought to the attention of the Supreme Court of Virginia by the Petition for Rehearing. The District Court's orders

were appealed to the Court of Appeals by both parties and a memorandum Decision was issued in each of the cases on June 28, 1973, denying and dismissing the appeals, without the case being briefed or argued before the panel although the District Court had granted a certificate of probable cause. Petitions for rehearing were filed on behalf of both parties but were rejected on July 19, 1973. Thereafter, on September 11, 1973, the panel of the United States Court of Appeals for the Fourth Circuit vacated the two prior orders and issued a Memorandum Decision affirming the judgment of the District Court for the reasons stated by that Court.

ARGUMENT

I.

The Courts Below Erred In Holding That There Had Been Exhaustion Of The Available State Court Remedies Insofar As The Alleged Instructional Error Is Concerned In Light Of The Fact That The Petition For Appeal Did Not Include This As An Error And Further In Light Of The Fact That The Issue Was Not Presented To The Supreme Court Of Virginia Squarely Until The Filing Of A Petition For A Rehearing And That Court Has Previously Held That It Will Not Take Cognizance Of Issues Raised For The First Time In A Petition For Rehearing.

The Rules of the Supreme Court of Virginia and § 19.1-284 of the Code of Virginia (1950), as amended, clearly provide that the Petition for Appeal filed in that Court "shall assign errors" and shall include "a statement of the questions presented with a clear and exact reference to the particular assignment of error to which each question relates" (See Rules 5:3, § 1 and 5:12, § 1(d) of the Former Rules of the Supreme Court of Appeals of Virginia which were in effect at the time of Moran's appeal). Thus, the fact that the petitioner had objected at trial to the granting of

the allegedly erroneous instruction in question and assigned the granting of that instruction as an error in his Notice of Appeal and Assignments of Error can be of no solace to him when the alleged error was not thereafter referred to as a ground for the granting of the appeal in the Petition for a Writ of Error or Petition for Appeal (See Appendix F, Notice of Appeal and Assignments of Error filed by Moran, and Appendix G, Petition for Appeal filed in Supreme Court of Virginia by Moran). As a matter of fact, it it respectfully submitted that under the Code of Virginia and its Rules, the Supreme Court of Virginia was bound not to consider this error and undoubtedly assumed that the issue had been abandoned since the filing of the Notice of Appeal and Assignments of Error. It should be pointed out that the Assignments of Error list seven numbered errors assigned and yet the Statement of Questions Presented on page 1 of the Petition for Appeal lists eight questions with specific references being made to errors 1, 2, 3, 4, 5 and 7 previously assigned with no reference whatsoever made to Assignment of Error No. 6 (See Appendix G at App. 17). The sole inference that logically can be drawn from this state of facts is that counsel for Moran had conciously and deliberately abandoned assignment of error no. 6.

After the Writ of Error was refused and the appeal dismissed, counsel for Moran made a belated effort to present the issue to the Supreme Court of Virginia by filing a Petition for a Rehearing but such petition could not effectively resurrect an issue previously abandoned and the issue consequently was never presented to the Supreme Court of Virginia in a timely or proper manner. The Supreme Court of Virginia has held, in the case of *Tazewell* v. *Herman,* 108 Va. 416, 60 S.E. 767, 61 S.E. 752 (1908), that:

> "What constitutes a personal payment thereof, within the meaning of Article II of the Constitution, was not involved in the case—was not argued by counsel for the defendant in error, and was not considered or passed upon by the Court. A failure, therefore, to pass upon that question furnishes no ground for granting a rehearing." (108 Va. at 425).

Thus, the Supreme Court of Virginia is limited on rehearing to a consideration of the issues that have been properly presented to it in the Petition for Appeal previously filed and considered. The United States District Court for the Eastern District of Virginia, Richmond Division, has recently held that raising an issue for the first time on a petition for rehearing does not satisfy the exhaustion requirements of 28 U.S.C. § 2254, citing *Tazewell* v. *Herman, supra* (See *Miller* v. *Lukhard,* Civil Action No. 59-73-R (E.D. Va. April 20, 1973)). However, the failure of the petitioner to properly comply with the appellate rules of the Supreme Court of Virginia, which have not been attacked by Moran as being unreasonable or amounting to a denial of due process, or the procedural statutes of Virginia, does not preclude his initiating a petition for writ of habeas corpus in either the Circuit Court of Caroline County or in the Supreme Court of Virginia (See §§ 8-596 and 17-19, Code of Virginia (1950), as amended).

It is further submitted that 28 U.S.C. § 2254(b) provides that exhaustion of State Court remedies must be accomplished prior to an application for a writ of habeas corpus in the Federal Courts and those remedies are not deemed exhausted if there is an available procedure in the state to raise the question presented. In addition, as your Honors have recently held in the case of *Picard* v. *Connor,* 404 U.S. 270 (1971), the Federal claim must be fairly presented to the state courts. In *Picard* the petitioner had

attacked in state proceedings the legality of his indictment on the ground that the procedure for indicting him had not complied with Massachusetts law. In the Federal courts, on the other hand, the petitioner was arguing that the indictment procedure utilized was a denial of equal protection of the law. The federal District Court involved denied the petition for the failure of the petitioner to exhaust available State court remedies and the United States Court of Appeals for the First Circuit reversed that decision. This Honorable Court reinstated the District Court's judgment and said:

> "The question here is simply whether, on the record and argument before it, the Massachusetts Supreme Judicial Court had a fair opportunity to consider the equal protection claim and to correct that asserted constitutional defect in respondent's conviction. We think not." (404 U.S. at 276; see also *Slayton* v. *Smith*, 404 U.S. 53 (1971).)

This determination, and the philosophy inherent therein, has consistently been adhered to (See, e.g., *Murch* v. *Mottram*, ... U.S. ....., 34 L.Ed.2d 194 (1972)).

It is respectfully submitted, therefore, that there is a procedure available in the Commonwealth of Virginia to test the validity of Moran's allegation which has not been previously utilized in a timely and proper manner. Moran may present his allegation by Petition for Writ of Habeas Corpus in the Circuit Court of Caroline County or in the Supreme Court of Virginia pursuant to the original jurisdiction of that Court. But to allow the petitioner to present in the federal courts by federal habeas corpus an issue which has not properly been presented procedurally in Virginia, would be to allow the petitioner to by-pass the Virginia Courts. The respondent respectfully submits that comity

between federal and state courts requires that Virginia first be allowed to consider a properly presented claim (See *Schneckloth* v. *Bustamonte,* ..... U.S. ....., 36 L.Ed.2d 854, 876 (1973)).

II.

Even Assuming, Arguendo, That Moran Has In Fact Exhausted His State Court Remedies, The Federal Court Should Assume That The Supreme Court Of Virginia, In Light Of Its Decision In Sharp v. Commonwealth, 192 S.E.2d 217 (1972), Just Ten Days Prior To Its Denial Of A Writ Of Error In This Case, Determine That The Granting Of The Instruction Herein Was Harmless Error And The Federal Courts Should Have Accepted That Determination In The Absence Of Any Compelling Evidence To The Contrary.

Petitioner herein, of course, asserts that Moran did not ever properly exhaust his available State court remedies by presenting, within an appropriate procedural context, the instructional issue to the Supreme Court of Virginia. However, this argument will be predicated upon the theory adopted by the United States District Court for the Eastern District of Virginia, Alexandria Division, in its ruling on the Motion to Alter and Amend that the Virginia Supreme Court must have considered the issue. In that event, then we must assume, that the Supreme Court of Virginia acted either in total ignorance of its holding ten days earlier in *Sharp, supra,* or we must assume that the Supreme Court of Virginia deemed the granting of the instruction to be harmless error. The District Court in its order and response to the Motion to Alter and Amend the Judgment, stated that counsel for Moran had been advised that the Supreme Court of Virginia had before it another challenge to the constitutionality of the section and no decision would be forthcoming in Moran's case until the statute's constitutionality had been determined in the other case. Thus, in

light of that specific finding by the Judge of the District Court, it must be assumed that the action of the Supreme Court of Virginia was taken in full recognition of the implication of the *Sharp* case and was not done in ignorance.

As has been previously pointed out, the only evidence adduced at trial was the testimony of Investigator Mitchell and the testimony of the State Drug Chemist, Mrs. Taylor. Investigator Mitchell testified at some length regarding the quantity of drugs found in the cab of Moran's truck, and he further testified that a number of the drugs were in separate small envelopes, and an additional quantity of small envelopes had been found in another package. The respondent herein had been advised of his rights and told Investigator Mitchell "that he had purchased these small envelopes to use to put the tablets in as he sold them to other drivers or other people." Investigator Mitchell was, at a later point in the trial, called by Moran as his witness, and during the course of that testimony, Investigator Mitchell pointed out that he had probably arrested in the neighborhood of 100 truck drivers for the possession of drugs similar to these, and the amount of drugs possessed by petitioner was considerably more than had been found on any of these previous truck drivers. There was no evidence produced by Moran that was inconsistent with any of this evidence. Thus, the only evidence that the jury had before them relative to the question of possession with intent to distribute was evidence affirming the existence of such an intent. *Even if the Supreme Court of Virginia, therefore, did consider the issue in question on its merits, the Court must necessarily have decided that the instruction in question amounted to harmless error beyond a reasonable doubt in light of the overwhelming nature of the evidence against Moran and the absence of any other evidence negat-*

ing the possession of the drugs with the requisite intent to distribute (See *Lavallee* v. *DellaRose,* ..... U.S. ....., 35 L.Ed.2d 637 (1973)).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be granted and the judgment in this case reversed.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

ROBERT E. SHEPHERD, JR.
Assistant Attorney General

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CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., an Assistant Attorney General of Virginia, counsel for C. A. Neff, Superintendent, Field Unit #21, in the captioned matter, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 16th day of October, 1973, I mailed a copy of the foregoing Petition for a Writ of Certiorari to the Judgment of the United States Court of Appeals for the Fourth Circuit by first class mail to Howard B. Silberberg, Esquire, 933 North Kenmore Street, Arlington, Virginia 22201, of counsel for respondent herein.

ROBERT E. SHEPHERD, JR.
Assistant Attorney General